IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.....

GREAT LAKES DREDGE & DOCK COMPANY,
A CORPORATION,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

The foregoing petition for Writ of Certiorari, in compliance with Rule 38 of the Rules of this Court, contains a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question; the question presented; and the reasons relied on for the allowance of the writ.

The facts in this case are undisputed. The controversy

arises over the conclusion of law of the District Court of the United States for the Northern District of Illinois, Eastern Division,[1] which was adopted by the Circuit Court of Appeals for the Seventh Circuit,[2] that an employe should be regarded as employed as a seaman, as that term is used in Section 13(a)(3) of the Fair Labor Standards Act, if he performs, as master or subject to the authority, direction and control of a master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. (R. 79, 96-97, 127-128.) No such definition of the word "seaman" is found in the Act, nor is any such definition found in any statute or decision of any court prior to the passage of the Fair Labor Standards Act. The definition originated with the Administrator of the Wage and Hour Division, United States Department of Labor, and was adopted by the Court in this case without discussion or any supporting authority. Section 13(a)(3) of the Act exempts "any employee employed as a seaman." It does not require that, in order for a seaman to be exempt from the provisions of the Act, such seaman "perform as master or subject to the authority, direction and control of a master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation." If an employe is a "seaman" by the plain language of the Act he is within the exemption irrespective of the service rendered by him.

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[1] Hereinafter referred to as the "District Court".
[2] Hereinafter referred to as the "Circuit Court".

OPINIONS OF THE CIRCUIT COURT AND DISTRICT COURT.

The opinion of the Circuit Court, entered therein on April 24, 1945, is reported in 149 F. (2d) 9, and can be found in the record herein. (R. 125-129, incl.) The order of the Circuit Court, entered June 9, 1945, denying the petition for rehearing in that Court can be found in the record herein. (R. 139.)

The opinion of the District Court was delivered orally and is not reported in the Official Reporter System. It can be found in the record herein. (R. 79-83.) The judgment of the District Court can be found in the record herein. (R. 98-99.)

SPECIFICATION OF ERRORS.

In support and amplification of the reasons relied upon for the allowance of the writ, as set forth on pages 5 to 6 of the foregoing petition, it is the contention of the petitioner that the Circuit Court erred in the following respects:

1. The Circuit Court erred in its conclusion that the Act is a remedial act and that its provisions with relation to the benefits conferred must be liberally construed in that the Court failed to recognize that the Act is also penal in character by reason of the provisions of Section 16(a) and 16(b) thereof.[3]

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[3] "(a) Any person who wilfully violates any of the provisions of section 15 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

2. The Circuit Court erred in its conclusion that the provisions of Sections 6 and 7 of the Act are applicable to the compensation payable to men working on dredges and that such workers are not seamen within the meaning of the provisions of Section 13(a)(3) of the Act. The evidence in this case and the law applicable thereto unequivocally bring the dredge workers, including the complement of tugs, dredges, launches, drill boats and scows within the provisions of Section 13(a)(3).

3. The Circuit Court in reaching the conclusion that "men employed on dredges" are not seamen within the meaning of Section 13(a)(3) of the Act, completely disregarded an unbroken line of judicial decisions of this Court and other Federal and District Courts which for more than seventy years have uniformly held employes employed on dredges to be seamen.

4. The Circuit Court in reaching its conclusion that "men employed on dredges" are not seamen within the provisions of Section 13(a)(3) of the Act, completely disregarded earlier statutes which by judicial interpretation and construction have been held to be applicable to "men working on dredges" and their attendant floating equipment and which decisions have extended to such class of workers all of the special benefits and privileges accorded seamen.

5. The Circuit Court by its decision and final judgment in this matter has created an inequitable and unjust discrimination between the large number of other employes of petitioner and "men working on dredges," all of whom work at similar jobs under similar conditions during the same hours and all of whom are considered in the industry as a part of a dredging crew. This unjust discrimination results from the finding that "men working on dredges" must be compensated for all time worked in excess of the

hours prescribed in Section 7 of the Act at not less than the rate of one and one-half times their normal rates of pay, while those who work on tugs (admitted by the Administrator to be seamen) as well as those who work on scows (if the decision of the First Circuit Court of Appeals referred to on page 5 of the petition is to be followed) are only entitled to their normal rates of pay for work in excess of the hours prescribed by Section 7 of the Act.

6. Notwithstanding the fact that the issue in the trial court and in the Circuit Court was definitely determined by the stipulation of the parties (R. 9), both the trial court and the Circuit Court failed to make any findings of fact or reach any conclusions of law with respect to the application of the provisions of Sections 6 and 7 of the Act to the compensation to be paid to those working as captains, engineers, firemen and deckhands on tugs; operators and engineers of launches; and scowmen attached to either a tug, launch or drill boat. The failure of the Circuit Court to adjudicate the question of whether Sections 6 and 7 of the Act are applicable to such employes or whether those sections are not applicable to such employes by reason of the provisions of Section 13(a)(3) will undoubtedly throw upon the petitioner and other dredging contractors the burden of defending numerous suits brought by employes under the provisions of Section 16(b) and may result in the accrual of heavy liabilities to such employes, all of which can be avoided by a determination of those issues in this Court.

7. The Circuit Court by judicially legislating that "men employed on dredges" are not seamen within Section 13(a)(3) has, in reaching that conclusion, adopted and approved without any judicial sanction the definition laid down by the Administrator in Interpretative Bulle-

tin No. 11[4] for determining when an employe will ordinarily be regarded as a seaman. The effect of that determination is to vest in the Administrator the absolute power and authority to discriminate not only against dredging contractors but also against various groups of maritime workers and is in direct conflict with the legislative intent as shown by the legislative history of the Act.

8. The Circuit Court in concluding that Congress intended that only those employes employed in water transportation and under the jurisdiction of the Maritime Commission are to be considered as seamen within the provisions of Section 13(a)(3) erred in that the legislative history of the Act and the decisions of this Court, the Circuit Courts of Appeals and the Federal District Courts do not sustain that conclusion. That conclusion is also inconsistent with the definition of the word "seaman" promulgated by the Administrator's Interpretative Bulletin No. 11 which was adopted by both the District and Circuit Courts.

9. The decisions relied upon by the Circuit Court in support of its decision are in the main not applicable thereto or are in conflict therewith. (R. 133-138.)

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[4] "This bulletin will not deal with the question as to which 'seamen' are so engaged, but will be directed solely to the scope of the exemption in section 13(a)(3). * * *

"3. An employee will ordinarily be regarded as 'employed as a seaman' if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character."

ARGUMENT.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

The petitioner employs upon its dredges and their attendant floating equipment during normal periods of operation approximately one thousand employes. (R. 3.) The petitioner is but one of the many dredging contractors who employ persons in similar positions upon dredges, tugs, launches, scows and drill boats used by such contractors in dredging activities on the navigable waters throughout the United States and its territories, including oceans and seas, their bays, sounds and harbors, bordering upon the states of the United States and its territories.[5] All dredging operations, whether performed in bays, sounds or harbors of the oceans or seas or upon the waters of the Great Lakes or other inland navigable waters are carried on substantially the same. The chief difference in the dredging operations conducted on or in different bodies of water lies in the type of equipment used. However, the general construction and operation of the equipment is substantially the same irrespective of its size. Since the decision of the Circuit Court in effect requires all dredging contractors to compensate "men employed on dredges" for hours worked in excess of those prescribed in Section 7 of the Act at not less than one and one-half times their normal rates of pay, it has a direct effect and bearing not only upon petitioner and its costs of operation but also upon all other dredging contractors performing dredging work in navigable waters which are instrumentalities of interstate commerce. It

[5] See petitioner's (Defendant below) Exhibit 1, certified by the Clerk of the Circuit Court to this Court (R. 140-141) for illustrations of petitioner's dredging equipment.

thus becomes apparent that the Circuit Court has decided a question of federal importance.

A most diligent search of the judicial decisions of this Court and of the Federal Circuit Courts, fails to reveal a single authority (with the exception of the case at bar and the case of *L. Metcalfe Walling, Administrator, etc.* v. *Bay State Dredging & Contracting Company,* First Circuit, 149 F. (2d) 346) which passes upon the question as to whether "men working on dredges" and their attendant floating equipment are seamen within the provisions of Section 13(a)(3) of the Act. The two decisions of the District Court of the United States for the District of Massachusetts, both involving the same question, held those working on dredges to be seamen and exempt under Section 13(a)(3) of the Act.[6]

Even the Administrator, notwithstanding the provisions of Interpretative Bulletin No. 11, *supra,* after the issuance thereof, in July of 1942 construed Section 13(a)(3) of the Act to exclude dredge workers' compensation from Section 7 of the Act (Wage and Hour Manual, 1942 Ed. p. 368).

We submit that it is, therefore, readily apparent that the question which has been decided by the Circuit Court is of grave federal importance to a large group of employers and employes; that it has never been passed upon and settled by this Court and therefore if there existed no other reason, which we do not concede, the decision of the Circuit Court should be reviewed and the question settled.

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[6] *Bolan* v. *Bay State Dredging & Contracting Co.*, 48 F. Supp. 266; *Walling, Admr.* v. *Bay State Dredging & Contracting Co.*, not reported, reversed in 149 F. (2d) 346.

2. The Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Long before any decision of this Court on the question, the early Federal Courts sitting throughout the country were called upon to pass upon and consider the status of "men working on dredges" with respect to the right of such workers to libel dredges for their wages. Since the earliest of those decisions all of the cases have held that dredges, tugs, flat boats, scows and barges are vessels and that men working thereon are seamen and have the right to libel the vessels for their services. (*Heppard* v. *The General Cadwalader*, 10 Fed. Cas. 169; *The Alabama*, 19 Fed. 544; *The Alabama and Two Scows*, 22 Fed. 449; *Huismann* v. *The Pioneer*, 30 Fed. 206; *McNamara* v. *The Atlantic*, 53 Fed. 607; *Evans* v. *The Starbuck*, 61 Fed. 502; *Saylor* v. *Taylor*, 77 Fed. 476; *Connelly* v. *The International*, 83 Fed. 840; *McRae* v. *Bowers Dredging Co.*, 86 Fed. 344; *Steam Dredge No. 1*, 87 Fed. 760; *McMaster* v. *One Dredge*, 95 Fed. 832; *North American Dredging Co.* v. *Pacific Mail S. S. Co.*, 185 Fed. 698; *The Hurricane*, 2 F. (2d) 70; *City of Los Angeles* v. *United Dredging Co.*, 14 F. (2d) 364; *Butler* v. *Ellis*, 45 F. (2d) 951; *Kibadeaux* v. *Standard Dredging Co.*, 81 F. (2d) 670.) Many of these decisions of the earlier Federal Courts have without reservation been cited and approved by this Court. (*The Robert W. Parsons*, 191 U. S. 17.)

In 1907 this Court had before it the question as to whether dredge workers were subject to the provisions of an Act of Congress of 1892 (c. 352, 27 Stat. 340, Section 1) commonly known as the Eight-Hour Law. That law in substance limited the hours of work of "laborers and mechanics" on public works to eight hours. Indictments were brought, convictions obtained and an appeal followed.

This Court in reviewing that statute held that dredgemen are seamen and not laborers and mechanics and that their training and duties all require something of the training and duties for which able bodied seamen are called on more or less to undergo and perform. (*Ellis* v. *United States*, 206 U. S. 246.) Subsequent to that decision Congress amended the Act of 1892 to include within the statute "services similar to those of laborers and mechanics in connection with dredging and rock excavation in any river or harbor." (Act of March 3, 1913, c. 106, 37 Stat. 726; 40 U.S.C. Section 221.) Prior to that amendment Congress had passed the Act of 1912 (c. 174, 37 Stat. 137; 40 U. S. C. c. 5, Section 324), also relating to hours of work of laborers and mechanics on public works. Attorney General George W. Wickersham was asked for an opinion as to the application of the Act to those employed on floating dredges. It was his opinion that they were exempt from the provisions of the Act because they were seamen and the equipment upon which they performed services vessels. (29 Op. Atty. Gen. 583; 1912.) In 1934 Attorney General Homer Cummings was asked to render an opinion to the Secretary of War as to whether crews on dredges and similar floating equipment were seamen within the meaning of the Act of 1912. He likewise held such men to be seamen and the equipment upon which they worked vessels. (38 Op. Atty. Gen. 150.) Congress is presumed to have knowledge of all such cases interpreting the meaning of the term "seaman" as used in earlier statutes and must therefore have intended that term to have the same meaning in the Act now in question.

The Circuit Court ignored the numerous decisions of this Court, and the decisions of the Circuit Courts of Appeals, and Federal District Courts, including those of the earlier Federal Courts, with no comment other than "we realize that the word 'seamen' has been construed in other con-

nections, and such constructions have comprehended dredge workers and related tasks." Having thus so casually dismissed the established and recognized judicial precedent which has been unbroken for more than three-quarters of a century, the Circuit Court proceeded to find a guide for its conclusion in the decisions of this Court in *South Chicago Co.* v. *Bassett*, 309 U. S. 251. In that case this Court had under consideration the application of the term "members of a crew" to a coal lighterage barge and the right of the worker on the barge to relief under the Longshoremen and Harbor Workers' Act. After a discussion of the case this Court concluded that the worker in question was not a member of the crew, but said that if Congress had used in the Act as finally passed the word "seamen" instead of the words "master or member of a crew," the decision might well have been otherwise, the Court stating "We think that this substitution has an important significance here." This Court has therefore recognized the distinction between the term "master or member of a crew" and the word "seamen" as used in legislation and has held that the term "master or member of a crew" is much more limited than the term "seamen" with respect to the coverage of workers.

We respectfully submit that the decision of the Circuit Court is not only probably in conflict with other applicable decisions of this Court *but is actually directly in conflict therewith* and with the well established meaning of the word "seamen" as judicially determined.

3. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor v. Bay State Dredging & Contracting Co., 149 F. (2d) 346.

The Circuit Court concluded that "the seamen described in said exception did not include workers on a dredge". (R. 128.) At no place in the decision does the Circuit Court define those workers that it intended to include under the term "workers on a dredge." The same can be said with reference to the judgment of the District Court. (R. 98-99.) The Stipulation of Facts shows that the scowmen are subject to the commands of the captain and other ranking officers of the dredge and they are carried on the crew's roster. (R. 19.) The work of a scowman is interchangeable with that of a deckhand, no distinction being made between a deckhand and a scowman. Deckhands are often assigned to the scows that attend the dredges as a part of the auxiliary equipment for carrying out the dredging operations. (R. 20.) It is apparent, therefore, that under the evidence scowmen are a part of the complement of the crew of a dredge and as such perform work on the dredge. That being true, it would appear that under the decision of the Circuit Court dredging contractors employing deckhands or scowmen are bound to compensate them for work in excess of the hours prescribed by Section 7 of the Act at rates not less than one and one-half their regular rates of pay. If the Circuit Court intended that scowmen should be thus treated then the decision of the Circuit Court is in conflict with that part of the decision of the Circuit Court of Appeals for the First Circuit in the case of *L. Metcalfe Walling, Administrator, etc.* v. *Bay State*

Dredging & Contracting Company, 149 F. (2d) 346, wherein it is stated "the scow or bargemen are admitted to be seamen and have been so treated."

We submit that this apparent conflict in the decisions of the two courts on identical questions should be eliminated by a final determination of this Court.

4. The Circuit Court of Appeals has so far departed from, and has sanctioned a similar departure by the District Court from, the accepted, established and usual principles of statutory construction that this Court should exercise its power of supervision over said Circuit Court.

It has long been a cardinal principle of statutory construction established by the decisions of this Court that the meaning of the statute must be first sought in the language therein employed. If that be plain, it is the duty of the Court to enforce the statute as written. When statutory language has a settled and well known meaning, sanctioned by judicial decisions, it is presumed to have been used by the legislature in the sense that it has been sanctioned by judicial decisions. (*The Abbotsford*, 98 U. S. 440, 444; *Logan* v. *United States*, 144 U. S. 263, 301; *Kepner* v. *United States*, 195 U. S. 100, 124; *United States* v. *Merriam*, 263 U. S. 179, 187; *Hoffman* v. *Palmer*, 129 F. (2d) 976, 983; *Westerlund* v. *Black Bear Mining Co.*, 203 Fed. 599, 605.) As has heretofore been pointed out, the word "seamen" as used in federal statutes and in admiralty law has long been interpreted to include every person (except apprentices) employed or engaged to serve in any capacity on board a vessel. The term "vessel" as interpreted by judicial decision and defined by statute has always included all of the floating equipment used by the petitioner and that is not questioned by the Administrator.

From a study of the Circuit Court's decision it is a fair assumption to say that that Court in arriving at the conclusion that it was the legislative intent of Congress that only those employed upon vessels as masters or members of a crew thereof subject to the jurisdiction of the Maritime Commission (49 Stat. 1985, 1992; 46 U. S. C. A. 1111, 1131), are "seamen" within the meaning of Section 13(a)(3) of the Act, did so primarily from the testimony of the representative of the National Maritime Union. (R. 128.) The Administrator in his brief before the Circuit Court of Appeals so contended (relying on that testimony). However, when faced with the decision in *Gale* v. *Union Bag & Paper Company*, 116 F. (2d) 27, cert. den., 313 U. S. 559, and (1) the fact that the jurisdiction of the Maritime Commission extends only to the establishment of "minimum-manning scales and minimum-wage scales and minimum working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy" and (2) the fact that the jurisdiction of that Commission is as to all such matters limited to vessels used in an essential service to the United States in foreign competition and then only when the operation of such vessels is required to meet such foreign-flag competition and promote foreign commerce of the United States, the Administrator was forced to, and did, argue:

> "It is true, of course, that the interpretation which the Administrator has put upon Section 13(a)(3) *does not confine the exemption* to workers operating vessels receiving differential subsidies and therefore coming under the jurisdiction of the Maritime Commission. *It would be unfair and impracticable* to grant the exemption to vessels receiving the subsidy and to deny it to competing vessels which did not."

It becomes apparent that the Court by its reference to the testimony before the Joint Congressional Committee and its conclusion that the "exemption did not include workers on a dredge" failed to consider carefully the

entire testimony of Ralph Emerson, a representative of the National Maritime Union. Reference to Mr. Emerson's testimony before the Joint Congressional Committee clearly shows that in behalf of his Union he was anxious to have the members thereof included in the benefits provided by the Act if those benefits were greater than those established by the Maritime Commission. He was frank to admit "we want our cake and we want to eat it at the same time."[7]

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[7] Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 1216, 1217:

"Further attention is called to title III, section 301, of the Merchant Marine Act of 1936, wherein the Maritime Commission is empowered to perform, for subsidized vessels of the United States Merchant Marine, duties similar to those asigned to the proposed board under H. R. 7200 and S. 2475. The section referred to reads in part:

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"Our union does not like to see any further or additional legislation enacted to cover a group of workers already so well covered, which might tend to create some confusion in labor relations, which are now on the road to practical and successful operation.

"Therefore, I ask on behalf of the Sailors Union of the Pacific, that the bill be so written as to exclude the seamen from the operation of the provisions of the bill."

Ralph Emerson, legislative representative of the National Maritime Union, stated (*Id.* at pp. 546-549):

"• • • we feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes of *workers who are engaged in transportation.* While this may not have an unfavorable effect upon the *workers engaged in transportation by water,* we feel that it may conflict with the laws now in effect regarding the jurisdiction of the Government machinery now set up to handle these problems.

• • • • •

"As this newly formed Maritime Commission has jurisdiction at present over seamen in regard to wages, working conditions, and manning scales on subsidized merchant ships, and as we have every faith in the ability and competency of the Commission to handle our affairs, we feel that for the present time that that jurisdiction should not be hampered or impaired by any legislation that would be conflicting.

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Sections 13 and 14 of the Act are the only sections wherein Congress has set forth the respective classes of employees engaged in interstate commerce or working on instrumentalities thereof whose wages and maximum hours of work at straight time rates shall not be subject to the

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"What we would like is an interpretation of the bill which would provide a protective clause for the seamen. If it is going to be the interpretation of the bill that *transportation workers* in general come under the jurisdiction of this Board then we would like to know it. I have never been able to find out yet as to whether the Board is going to have jurisdiction over us.

"The Chairman (Senator Black). Do you think it would be unwise to have two boards with jurisdiction over the same group?

"Mr. Emerson. Yes, sir.

"The Chairman. Which would you prefer?

"Mr. Emerson. We would prefer the Maritime Commission.

"The Chairman. You would prefer the Maritime Commission?

"Mr. Emerson. Yes, sir. The position is—some people might say we want our cake and we want to eat it at the same time because while we want to go along under the *jurisdiction of the Maritime Commission*, we feel, however, *if the Labor Standards Board established a higher standard, then we would like to get any benefits which might accrue from this*, although we feel that the Maritime Commission is going to do a good job as regards the merchant marine.

"Representative Connery: In other words, you want double protection.

"Mr. Emerson. This is simply a protective clause; yes, sir. As this newly formed Maritime Commission has jurisdiction, at present, over seamen in regard to wages, working conditions, and manning scales *on subsidized merchant ships*, and as we have every faith in the ability and competency of the Commission to handle our affairs, we feel that for the present time that that jurisdiction should not be hampered or impaired by any legislation that would be conflicting.

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"The Chairman. Thank you very much. I might say, so far as I am individually concerned, I believe it would be improper to have a conflict of jurisdiction between two boards. I would not want to have divided jurisdiction. I would want one that had complete authority. I do not believe the bill, as written, covers the seamen, although there may be a question about it." (Italics added.)

provisions of Sections 6 and 7 of the Act. It is clear from the pattern of Sections 13 and 14, respectively, that Congress was careful in the use of its language in defining those whose wages and hours are not subject to the provisions of Sections 6 and 7.

It will be noted that under Section 13(a)(1) Congress gave to the Administrator authority to define and delimit by regulations the meaning of the terms "bona fide, executive, administrative, professional or local retailing capacities or capacities of outside salesmen."

In Section 13(a)(2) Congress exempted employes engaged in any retail or service establishment the greater part of whose selling or services is in intrastate commerce. What constitutes intrastate and interstate commerce, respectively, has long been established by decisions of this Court. It, therefore, becomes only a question of fact under the last mentioned section as to whether a particular employe spends a greater part of his employment in intrastate commerce.

In Section 13(a)(4) Congress exempted employes of a carrier by air subject to the provisions of title II of the Railway Labor Act. The Railway Labor Act is specific in its language as to those subject thereto. Thus Section 13(a)(4) is clear and unambiguous as are the previous provisions of Section 13(a)(3) thereof.

By Section 13(a)(5) Congress exempted employes employed in catching, etc., any kind of fish, shell fish, etc., or in loading, unloading or packing of such products for shipment or in propagating, etc., or in distributing such products or by-products thereof. It is clear, therefore, that Congress knowing that a term such as "fishing" would be subject to various interpretations was careful to make the fishing industry as a whole and its employes, including all of those within the categories defined in subsection (5) exempt from the Act by specific definition.

Section 13(a)(6) exempts those employed in agriculture. An agricultural worker is readily classified even in layman parlance by the type of work he does.

In Section 13(a)(7) Congress gave to the Administrator additional authority to exempt employes by regulations or orders with reference to Section 14 covering learners, apprentices and handicapped workers.

Likewise the language of Section 13(a)(8) is perfectly clear and even a layman understands when a person is employed in connection with the publication of any weekly or semi-weekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published. This Court can take judicial notice of the fact that most newspapers publicize their circulation both in and out of the county and Congress must have been aware of such a fact.

Section 13(a)(9) exempts those employed on street and suburban railways and other types of transportation systems therein referred to not elsewhere in Section 13 exempted. It is clear that Section 13(a)(9) is intended to exempt from Sections 6 and 7 of the Act those engaged in intrastate transportation services and whose terms of employment are a matter of state or municipal concern and over which if Congress attempted to exercise jurisdiction its acts with respect thereto would be unconstitutional.

The language of Section 13(a)(10) again, like the provisions of Section 13(a)(1) and 13(a)(7) gives to the Administrator the power to define the class of employes falling within the provisions of those sections.

Section 13(a)(11) needs no explanation and its application depends only upon a determination of whether a

switchboard operator is as a fact an employe in a public exchange which has less than five hundred stations.

It is perfectly clear, from the foregoing pattern of Sections 13 and 14 of the Act, that Congress did not intend that only a limited group or class of those who, by reason of their occupation or work, have been previously recognized as "seamen" were to be included within the meaning of the term "seaman" as defined in Section 13(a)(3). Had Congress so intended, it would have said so either (1) in the manner which it did in Sections 13(a)(1), 13(a)(7), 13(a)(10) or (2) as set forth in Section 14 of the Act. It would have been no greater task for Congress, knowing the judicial definition of the word "seaman" had it intended to limit the meaning of that term (as the Circuit Court has by its decision), to have adopted the foregoing method of limitation or, even better, to have provided in Section 13(a)(3) either (1) "the provisions of Sections 6 and 7 shall not apply with respect to any officers or crews employed on all types of vessels whose minimum-manning scales and minimum-wage scales and minimum working conditions are subject to the jurisdiction of the Merchant Marine Act of 1936" or (as contended for by the Administrator) to (2) "any employe employed as a seaman (as such term is defined and delimited by regulations of the Administrator)."

The ancient judicial rule that instructions, interpretations, orders or decisions will be given no force and effect by the Courts if not in strict accordance with the statute pursuant to which issued, and the statutes are themselves constitutional, clear and unambiguous, must be recognized. The rule applies regardless of whether such instructions, interpretations, orders or decisions are issued by the President of the United States or any executive officer

thereof having authority under statutory regulations to issue such instructions. 1 Warren, Supreme Court of the United States, 199-200; 283-284; 328; 475; *Marbury* v. *Madison,* 1 Cranch, 137; *Little* v. *Barreme,* 2 Cranch, 170; *The Floyd Acceptances,* 7 Wallace 666; *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, and many others.

If the Administrator is to be given the authority under Section 13(a)(3), contrary to Congressional intent, to define in each particular case those classified as seamen within the meaning of Section 13(a)(3) of the Act, or if, by virtue of the decision in the case at bar and the *Bay State Case, supra,* it is to rest with the Court to delimit the long established meaning of the term "seaman" as used in legislation and in admiralty law, the effect is to make it possible by administrative action or judicial decision to disregard, destroy and overrun the long established principle of constitutional government, that the will of Congress must be obeyed. While it may be a worthy and humanitarian position for the Circuit Court to have taken in concluding that the "exemption did not include workers on a dredge," it nevertheless remains that in doing so the Court has engaged in the practice of judicial legislation, long criticized by this Court in too numerous occasions to make it worth while to refer to. In recent years administrative and executive officers of the government and departments thereof have by their instructions, interpretations, orders and decisions evidenced almost a fanatical desire to take unto themselves the function of legislation. Present Secretary of Labor, Lewis B. Schwellenbach, realizing this and being firmly entrenched in the principles of legislative and judicial branches of the government, found it desirable and necessary on July 3, 1945 to issue General Order No. 1, with the approval of the President, in which

he insisted that the officers of his Department accept the laws as Congress has written them and not as they might think Congress should have written them.[8]

We submit that the Circuit Court has totally disregarded all established rules of construction to such an extent that the exercise of supervision by this Court over the Circuit Court becomes essential and necessary to preserve the principles of constitutional government and to correct such gross departures from the recognized rules of statutory construction.

5. The decision of the Circuit Court of Appeals for the Seventh Circuit results in discrimination between persons employed at substantially similar tasks.

Application of the Circuit Court's decision to the determination of compensation payable to employes of dredging contractors engaged in the performance of service on dredges and their attendant floating equipment creates an unjust, unreasonable and inequitable discrimination between various classes of such employes. We have pointed out that the Circuit Court concluded that "men employed

[8] "The Secretary of Labor, Lewis B. Schwellenbach, with the approval of the President, has issued the following 'General Order No. 1' of the Labor Department:

"General Order No. 1.

"I am issuing this Order now before any specific instance arises so as not to subject anyone to embarrassment. Perhaps because my previous experience has been in the legislative and judicial branches of the Government, I am peculiarly sensitive to the importance of the question.

"I must insist that in this Department there is given full recognition to the fact it is the function of this Department to execute the laws. *The duty of an officer in this Department is to accept the laws as Congress has written them. The fact that he may think the Congress should have written, or the Courts should have interpreted a law differently in no case justifies him in ignoring or attempting to circumvent the law.* I will expect full cooperation on this policy." (Italics supplied.)

on dredges" are not seamen. We have also pointed out that if the decision is followed to its logical conclusion and the words "men employed on dredges" are given their ordinary meaning they would mean that only those who worked upon a dredge are entitled to receive the benefits of Sections 6 and 7 of the Act. If that is true, then scowmen who work sometimes on the dredge and sometimes on the scow would be entitled to the benefits of Sections 6 and 7 of the Act, depending upon the hours that they work upon the dredge and the scow, respectively. Under the decision in the case of *Walling* v. *Bay State Dredging & Contracting Company, supra,* it appears definitely that scowmen are seamen and, therefore, are not entitled to the benefits of Sections 6 and 7 of the Act. By the stipulation of counsel for the Adminisrator in the case at bar it was agreed that those who work on tugs are seamen and not entitled to the benefits of Sections 6 and 7 of the Act. (R. 32.) We have then a situation where the complement of a tug's crew and the scowmen whose scows are assigned to a dredge must work the same hours as those employed on the dredge under the same conditions, including all perils encountered by those working on water, and perform substantially the same type of work, yet their pay is computed on an entirely different basis.

We contend that it was not the intent of Congress by the passage of the Act that there be such a discrimination in the compensation paid to those who work together at substantially the same tasks under the same conditions and subject to the same perils. Congress being presumed to know the judicial meaning of the word "seamen" and being presumed to know that for more than seventy years dredgemen have been classified by the Courts as seamen, it must follow that Congress adopted the broader term of seamen in order that such discrimination might not arise. As we have pointed out, this Court has consistently held that where the term "a master or member of a crew of a

vessel" is employed Congress intended to cover a much smaller group of maritime workers and in furtherance of this Court's recognition of that fact, it has held that dredgemen and scowmen are not either masters or members of a crew. It seems logical, therefore, that in order that the discrimination referred to might not exist, Congress purposely adopted the broader term, namely, "seamen."

6. The Circuit Court of Appeals failed, as did the District Court, to pass upon and determine the status of all employes engaged in dredging activities, nothwithstanding the fact that by stipulation and by issue made under the pleadings the status of all employes employed in the operation of the equipment described in the Stiplation of Facts in relation to Section 13(a)(3) of the Act was in issue.

It was stipulated before the District Court, which stipulation was before the Circuit Court, as follows:

> "That the sole issue before the Court in the above cause is whether the employes of the defendant employed in the operation of the equipment hereinafter described are seamen within the meaning of that term as used in Section 13(a)(3) of the Fair Labor Standards Act." (R. 9.)

We submit that the foregoing language clearly defines the issue. The equipment and the employes employed in the operation thereof are likewise as clearly described. (R. 9-26.) Yet, notwithstanding the clear definition of the issue, the District Court and the Circuit Court failed entirely to decide the question whether those employed on tugs as captains, engineers, electricians, oilers, firemen and deckhands and those employed on launches as operators and engineers and those employed on scows are seamen within the meaning of that term as used in Section 13(a)(3) of the Act.

We submit that the petitioner and the employes engaged in the respective operations of dredging are entitled, under

the issue in this case, to a determination of those matters and should not be put to the expense of further litigation to have such matters settled.

7. The authorities cited by the Circuit Court of Appeals for the Seventh Circuit do not support or sustain the conclusion reached as the final judgment of that Court and that Court gave no consideration to the legislative and judicial meaning of the term "seaman" as long recognized by this Court.

No useful purpose would be served in extending the length of this brief to argue the above proposition, which is self-evident. It is sufficient to refer the Court to the Record, pages 133-138, wherein the matter is fully discussed.

CONCLUSION.

We respectfully submit that the arguments herein and the authorities referred to conclusively support the position of the petitioner and we, therefore, respectfully urge that the Writ of Certiorari prayed for in the foregoing petition be granted and that upon review of the decision of the Circuit Court that decision be reversed.

Respectfully submitted,

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